(22)

No. 06-5754

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

VICTOR A. RITA, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR REHEARING

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MISCELLANEOUS

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Pursuant to Rule 44.1, Victor A. Rita, Jr., respectfully petitions for rehearing of the Court's decision in his case rendered June 21, 2007.

GROUNDS FOR REHEARING

Petitioner recognizes that rehearing is an extraordinary remedy, but respectfully submits that it is warranted in this case because of the diametrically opposed positions taken by the Executive Branch in two criminal cases of national import: Mr. Rita's case and the case of *United States v. I. Lewis Libby*, Criminal No. 05-394 (RBW) (D.D.C.).Further, rehearing would be the appropriate mechanism, in light of the President's rationale underlying his commutation of I. Lewis Libby's sentence, for the Court to reconsider its remedial decision in *United States v. Booker*, 543 U.S. 220 (2005).

I. THE CONSTITUTION REQUIRES EXECUTIVE BRANCH EVENHANDEDNESS IN THE EXECUTION OF THE LAWS

The relevant parts of the Constitution governing the powers of the Executive Branch at issue here are as follows.

> Section 1. The executive Power shall be vested in a President of the United States of America.
>
> * * * *
>
> Section 3. He shall ... take Care that the Laws be faithfully executed[.]

U.S. Const. art. II, §§ 1,3.

As the Chief Executive, the President is at the country's helm, tasked with faithfully executing the laws passed by Congress. He and his subordinates are the ones who argue their application before the Judiciary, as this case exemplifies. As the Court noted eighty years ago:

> The vesting of the executive power in the President was essentially a grant of the power to execute the laws.

> But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this court. As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible.

Myers v. United States, 272 U.S. 52, 117 (1926) (internal citations omitted). A third implication flows from the Court's decision in *Myers*: The President and his subordinates must act with uniformity when executing the laws.

The recent statement[1] by the President, released in conjunction with his commutation of Mr. Libby's sentence, directly conflicts with the federal sentencing policy espoused by the Administration[2] and argued vehemently, indeed successfully, by the Executive's own Solicitor General in this case.

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[1] July 2, 2007, Statement by the President on Executive Clemency for Lewis Libby, *available at,* http://www.whitehouse.gov/news/releases-/2007/07/20070702-3.html (herein "Statement"). Epitomizing the many ironies between the *Libby* case and the *Rita* case, July 2, 2007, the day Mr. Libby's sentence was commuted, also was the same day Mr. Rita had to report to the Bureau of Prisons to begin the service of his sentence.

[2] June 1, 2007, Prepared Remarks of Attorney General Alberto R. Gonzales, available at, http://www.usdoj.gov/ag/speeches/2007/ag_-speech_070601.html (calling for the passage of legislation to "restore the binding nature of the sentencing guidelines so that the bottom of the recommended sentencing range would be a minimum for judges, not merely a suggestion[.]").

Ironically, the President set forth in the Statement his conclusion that the district court in the *Libby* case rejected "the consideration of factors that could have led to a sentence of home confinement or probation."[3] This was the precise, nearly verbatim, argument made by the Petitioner[4] in this case and opposed by the President's subordinate, his Solicitor General.[5]

A short comparison of this case with Mr. Libby's discloses the striking similarities between the two despite their disparate results. To begin, neither man was the target of the investigation for which he was ultimately charged. In North Carolina, the U.S. Attorney's Office began an investigation of a North Carolina firearms company to determine whether it was violating the federal firearms laws.[6] In the process of this investigation, witnesses, including Mr. Rita, were brought before the grand jury to testify. In Washington, D.C., a Special Prosecutor was appointed to investigate the leaking of Valerie Wilson's name to columnist Robert Novak to learn whether any person violated either the Intelligence Identities Protection Act or the Espionage Act. In the process of this investigation, witnesses, including Mr. Libby, were brought

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[3] Statement ¶ 8.

[4] "Properly considering all of the facts, there was no need for a custodial punishment. A term of probation, or other alternative to incarceration such as house arrest, would have amply satisfied the needs to 'reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.' 3553(a)(2)(A)." Pet. Br. at 23.

[5] "[I]t would be a rare case in which the Guidelines range is not within the broad range of reasonableness, and it would be a rarer case in which the bottom of the Guidelines range is not within that range. This is not such a case." Gov. Br. at 50 (internal citation and quotation marks omitted). It should be noted that both Mr. Rita and Mr. Libby received a sentence at the bottom of their respective Guidelines ranges.

[6] (J.A. 7). Citations to the record filed in this case and contained in the Joint Appendix are referenced as (J.A.).

before the grand jury to testify. Both men – Rita and Libby -- were federally indicted on two counts of making false statements under oath, two counts of perjury, and one count of obstruction of justice. Both were convicted by a jury. Both men were sentenced at the low end of their respective Guidelines ranges: Mr. Rita for 33 months and Mr. Libby for 30 months. Both men have extensive civil service backgrounds and are dedicated family men. Significantly, both men have been subjected to what the President noted in Mr. Libby's case as "a harsh sentence based in part on allegations never presented to the jury [,]"[7] something the Court has labeled *Apprendi*[8] error.[9] Despite all of these similarities, today Mr. Rita is in prison and Mr. Libby is not.

The President granted executive clemency to Mr. Libby after his convictions for perjury and obstruction of justice because the President believed that the 30 month sentence imposed was "excessive."[10] The President stated

> My decision to commute his prison sentence leaves in place a harsh punishment for Mr. Libby. The reputation he gained through his years of public service and professional work in the legal community is forever damaged. His wife and young children have also suffered immensely. He will remain on probation. The significant fines imposed by the judge will remain in effect. The consequences of his felony conviction on his former life as a lawyer, public servant, and private citizen will be long lasting.[11]

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[7] Statement ¶ 5.

[8] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[9] "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Booker*, 543 U.S. at 227-8 (citations omitted).

[10] Statement ¶ 9.

[11] Statement ¶10.

The President cited critics who "have made important points" that "the punishment does not fit the crime: Mr. Libby was a first-time offender with years of exceptional public service and was handed a harsh sentence based in part on allegations never presented to the jury."[12] Petitioner raised those very same "important points" in arguing that his 33-month sentence for the same offenses was excessive, but was opposed by the Executive Branch every step of way. The facts in Petitioner's case are far more compelling than those cited by the President in commuting Mr. Libby's sentence.

As set forth in his Brief, Petitioner identified significant grounds for his request for a sentence below the guideline range, including his military service, his civil service, and his physical impairments.[13]

For 24 years, Mr. Rita served in the United States Marine Corps, the United States Army, and the United States Army Reserve. His service included tours of duty in the Vietnam and Gulf Wars, and he has received more than 35 awards and medals for distinguished conduct.[14] His service to his country resulted in serious physical ailments. He was exposed to Agent Orange during the Vietnam War, which continues to produce skin rashes and infections that require perpetual care. He has diabetes, which causes periodic numbness in the feet as well as memory and eyesight loss. He suffers from arthritis, an enlarged prostate, acid reflux, a herniated disk, and sleep apnea.[15] To treat these conditions, Mr. Rita - who is 59 years old - requires a long list of prescription medications.

Since Mr. Rita's sentencing, his health has continued to deteriorate, which is another reason that it is appropriate for the reasonableness of his sentence be revisited. Up until his

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[12] Statement ¶ 5.

[13] (J.A. 40-47, 64-65).

[14] (J.A. 65).

[15] (J.A. 68-73).

incarceration, the Department of Veterans Affairs continued to treat Petitioner for Post-Traumatic Stress Disorder (PTSD). His doctor noted that although Mr. Rita is compliant with his treatment and medication, "[h] is symptoms continue to worsen including severe depression, anhedonia, and lack of concentration."[16] Before reporting to the BOP, Petitioner participated in bi-monthly group therapy with other Vietnam veterans."While he does report having benefitted from the supportive context of his therapy group, he continues to report significant PTSD symptoms, including intrusive memories, nightmares, disrupted sleep patterns, poor concentration, and irritability. It is believed that his chronic PTSD condition has interfered and continues to interfere significantly with his ability to function in both social and occupational settings."[17] Finally, the Department of Veteran's Affairs recently found Petitioner "totally and permanently unemployable" at any job due to the extent of his multiple conditions.[18]

Like Mr. Libby, Mr. Rita had no criminal history points under the Guidelines and he was handed a harsh sentence based in part on a cross-reference under the Guidelines to an offense that was unsupported by the jury determination. Unlike Mr. Libby, he has over 24 years of service in the military, a service that has left him so disabled as to be totally and permanently unemployable.

The Solicitor General argued before this Court that Petitioner's 33 month sentence was reasonable. The Solicitor General argued that Mr. Rita's personal characteristics were not nearly sufficient to rebut the presumption that a within-Guidelines sentence is reasonable. The Solicitor General argued that "one of the things [a judge] is required to do under

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[16] Letter of Aitala Giron, M.D., attached as Exhibit 1.

[17] Letter of Pam Slone, Ph.D., attached as Exhibit 2.

[18] Letter of Ronald B. Tolchin, D.O., attached as Exhibit 3.

section 3553(a) is to consider the need to avoid unwarranted disparity between defendants who have been convicted of similar criminal conduct and have similar records."[19] The Solicitor General further noted that "we are in a Federal system with 674 Federal district judges, and we cannot have all our own personal guidelines systems."[20] Finally, the Solicitor General used as an example of an unreasonable sentence one where the judge "takes a guideline range like this one, of 33 months to 41 months, and the judge says in my view military service means that this defendant gets probation."[21]

Although it is arguable[22] that the *Libby* case presents less of a sympathetic basis for a non-custodial sentence than Petitioner's case, the Executive determined that one day of prison time was too much for Mr. Libby. That position is entirely inconsistent with a statement that "it would be a rarer case in which the bottom of the Guidelines range is not within that range [of reasonableness]."[23] With his sentenced commuted, Mr. Libby essentially has received probation, a sentence that the Solicitor General argued would be unreasonable in Mr. Rita's case.[24]

Clearly, the Executive Branch has taken inconsistent positions in different cases, an inconsistency that cannot be supported by factual differences but rather stems from an unjustified policy difference in executing the federal sentencing

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[19] February 20, 2007, oral argument of Deputy Solicitor General Michael Dreeben, *Rita v. United States*, No. 06-5754, Oral Arg. Trans. at 37.

[20] *Id.*

[21] *Id.*, at 38.

[22] *See generally* "What Was Bush Thinking" *available at* http://www.washingtonpost.com/wpdyn/content/blog/2007/07/05/BL2007070500940pf.html

[23] Gov. Br. at 50 (internal citation and quotation marks omitted).

[24] *Rita v. United States*, No. 06-5754, Oral Arg. Trans. at 38.

Guidelines in similar cases. The latest move by the executive Branch reflects a policy change that a sentence under a properly calculated Guideline range is excessive and cannot be deemed reasonable, let alone presumptively reasonable.

Asserting a new policy in one case within weeks of asserting a totally contrary policy in another case raises issues related to the doctrine of judicial estoppel. "The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." 18 Moore's Federal Practice § 134.30, p. 134-62 (3d ed. 2000) (quoted in *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)). The purpose of judicial estoppel is "to protect the integrity of the judicial process ... by prohibiting parties from deliberately changing positions according to the exigencies of the moment."[25]

Several factors help determine whether the doctrine should be applied. "First, a party's later position must be 'clearly inconsistent' with its earlier position."[26] The second consideration is whether the party prevailed in its early position "so that judicial acceptance of an inconsistent position in a later preceding would create 'the perception that either the first or the second court was misled.' "[27] A third consideration is "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."[28] The Court noted that "[i] n enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional

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[25] 532 U.S. at 749-50 (internal quotation marks and citations omitted).

[26] *Id.*

[27] *Id.* (internal citation omitted).

[28] *Id.*, at 751.

considerations may inform the doctrine's application in specific factual contexts."[29]

In this case, the Executive Branch has adopted a new position regarding sentencing that is clearly inconsistent with its earlier position, a position that was adopted by this Court in *Rita* at the behest of the Executive. Although it is not a typical judicial estoppel case, the doctrine is applicable under these circumstances because the Executive is taking inconsistent stances in substantially similar cases. The result is a wide-spread perception of unfairness that undermines the nation's trust in the criminal justice system. That distorted perception calls for an equitable remedy.

To remedy this perception, the Court should at least reconsider its majority opinion, vacate Petitioner's sentence, and remand the case to the sentencing court for further consideration in light of the President's revised position on "excessive" sentences. Because the President identified, and arguably embraced, the Court's evolving Sixth Amendment jurisprudence, noting that Mr. Libby "was handed a harsh sentence based in part on allegations never presented to the jury [,]" the Court should reconsider its remedial decision in *Booker* as well.

II. THE COURT SHOULD RECONSIDER ITS REMEDIAL OPINION IN *UNITED STATES v. BOOKER*

Ironically, in *Rita*, the Executive Branch argued that the uniformity and consistency provided by the Guidelines was of supreme importance and a sentence within that range is presumptively reasonable. In *Libby*, the Executive Branch was unconcerned by consistency or uniformity, focusing instead upon the excessiveness of the sentence determined in large measure by the irrelevance of Mr. Libby's background and personal characteristics under the Guidelines, and that facts

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[29] *Id.*

never submitted to the jury nor proven beyond a reasonable doubt were used to increase Mr. Libby's punishment. In short, the Executive Branch took notice of the Guidelines' continued Sixth Amendment violation.

Beginning with *Jones v. United States*, 526 U.S. 227 (1999), the Court examined the Sixth Amendment's history and recognized that judicial factfinding operating to increase a defendant's otherwise maximum punishment posed a grave constitutional question. Invoking the doctrine of constitutional avoidance, the Court interpreted the statute at issue in *Jones* to skirt the constitutional problem. Shortly over one year later, the Court had no choice but to address the constitutional issue head-on in *Apprendi*. The Court held that, other than a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[30] Again and again, the Court has reaffirmed the rule of *Apprendi*, applying it to facts subjecting a defendant to the death penalty,[31] to facts permitting a sentence in excess of the standard range under the State of Washington's sentencing laws,[32] to facts triggering a sentencing enhancement under the federal Guidelines,[33] and to facts permitting movement to a more severe sentencing triad under the State of California's sentencing laws.[34]

In all of the Court's Sixth Amendment decisions since *Jones*, except one, it applied the *Apprendi* rule and it invalidated the offending legislation, less the legislation be construed to conform to apply to the espoused Sixth Amendment protections. The one exception was the remedial decision in

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[30] 530 U.S. at 490.31

[31] *Ring v. Arizona*, 536 U.S. 584, 602, 609 (2002).

[32] *Blakely v. Washington*, 542 U.S. 296, 304-305 (2004).

[33] *Booker*, 543 U.S. at 243-244.

[34] *Cunningham v. California*, 127 S. Ct. 856, 871 (2007).

Booker. Although the Court excised portions of the Sentencing Reform Act in an effort at Sixth Amendment compliance instead of *Blakely*-izing the Guidelines, Justice Scalia accused the Court of judicial legislation.[35] That "reasonableness" review has wrought disparate treatment under the Guidelines since *Booker* is beyond dispute. "As should be clear from our need to decide the case today, however, precisely what 'reasonableness' review entails is not dictated by *Booker*."[36]

As can be gleaned from the opinions filed in Petitioner's case, five members of the Court still recognize the viability of an as-applied Sixth Amendment violation under the Guidelines: "Moreover, even if some future unusually harsh sentence might violate the Sixth Amendment because it exceeds some yet to be defined judicial standard of reasonableness, Justice Scalia correctly acknowledges this case does not present such a problem."[37] "[M] y position is that there will inevitably be *some* constitutional violations under a system of substantive reasonableness review, because there will be some sentences that will be upheld as reasonable only because of the existence of judge-found facts. *Booker* itself reveals why that reality dooms the construct of reasonableness review established and applied by today's opinion.[38] "I would therefore reject the presumption of reasonableness adopted in this case, not because it is pernicious in and of itself, but because I do not think we can recognize such a

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[35] *Booker*, 543 U.S. at 310 (Scalia, J., dissenting) ("The Court's need to supplement the text that remains after severance suggests that it is engaged in 'redraft[ing] the statute' rather than just implementing the valid portions of it.") (citations omitted).

[36] *Rita v. United States*, No. 06-5754, Slip Op. at 2 (Scalia, J., concurring).

[37] *Rita v. United States*, No. 06-5754, Slip Op. at 6 (Stevens with whom Ginsburg, JJ., joins concurring).

[38] *Rita v. United States*, No. 06-5754, Slip Op. at 8 (Scalia with whom Thomas, JJ., joins concurring).

presumption and still retain the full effect of *Apprendi* in aid of the Sixth Amendment guarantee.[39]

With the President's appellation of "excessive" to describe Mr. Libby's low-end Guideline sentence, together with his observation that judge-found facts were employed to reach an unusually harsh 30 month result, the Court should accept the President's conclusions as an invitation to revisit its remedial decision in *Booker*. "The upshot is that today's decision moves the threat to the practical value of the Sixth Amendment jury right closer to what it was when this Court flagged it in *Jones*, and it seems fair to ask just what has been accomplished in real terms by all the judicial labor imposed by *Apprendi* and its associated cases."[40] Likewise, it seems equally fair to ask just what will be accomplished in real terms by the judicial labor yet to be expended in *Gall*[41] and *Kimbrough*?[42] Will the Sixth Amendment jury right flagged by the Court in *Jones* be further obfuscated?

CONCLUSION

The Court should grant rehearing in this case because of the diametrically opposed positions taken by the Executive Branch in this case and the *Libby* case. Further, rehearing would be the appropriate mechanism, in light of the Executive Branch's rationale and policy change underlying the commutation of Mr. Libby's sentence, for the Court to reconsider its remedial decision in *Booker*.

Respectfully submitted this the 16th day of July, 2007.

/s/ Thomas N. Cochran
THOMAS N. COCHRAN
Counsel of Record for Petitioner

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[39] *Rita v. United States*, No. 06-5754, Slip Op. at 8 (Souter, J., dissenting).

[40] *Rita v. United States*, No. 06-5754, Slip Op. at 8 (Souter, J., dissenting).

[41] *Gall v. United States*, No. 06-7949, cert. granted, June 11, 2007.

[42] *Kimbrough v. United States*, No. 06-6330, cert. granted, June 11, 2007.

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APPENDIX

APPENDIX A

DEPARTMENT OF VETERANS AFFAIRS
Medical Center
1201 Northwest 16th Street
Miami FL 33125-1693

Mr. B. C. Gibbard
Veterans Service Center Manager
Regional Office
P.0 Box 1437
Department of Veterans Affairs
St. Petersburg, Florida 33731

Rita. Victor
SSN:

Dear Sir:

This is to verify that Mr. Rita is diagnosed with and being treated for chronic Post-Traumatic Stress Disorder at the Department of Veterans Affairs Medical Center. Mr. Rita is followed at the PCT clinic on a regular basis for medication follow up and group therapy. He has been compliant and an active participant in treatment. Also. he recently completed a 14 week Residential Treatment.

Mr. Rita continues to have serious residual symptomatology even though he is complaint with his treatment and medication. His symptoms continue to worsen including severe depression, anhedonia, and lack of concentration. He has severe difficulties with sleep, frequently waking up during the night. nightmares. severe isolation and avoidance. He has recurrent intrusive thoughts distressing in nature and severe difficulties with irritability and labile affect. Symptoms are consistent with a diagnosis of chronic PTSD. It is felt that his chronic PTSD has interfered significantly with his ability to function in a social and occupational role.

Prognosis guarded.

Should you require additional information, please do not hesitate to contact the undersigned at (305) 324-4457. ext. 3813.

Sincerely

/s/ Aitala Giron,
Aitala Giron, M.D.
Staff Psychiatrist
Post Traumatic Stress
Disorder Clinic

APPENDIX B

DEPARTMENT OF VETERANS AFFAIRS
Medical Center
1201 Northwest 16th Street
Miami FL 33125-1693

April 19, 2007

Department of Veterans Affairs
Regional Office
ATTN: Adjudication Officer
PO Box 1437
St. Petersburg, FL 33731
RE: Victor A. Rita, Jr. SS

Dear Sir or Madam.

This is to verify that Mr. Victor A. Rita has been diagnosed with arid continues to be treated for chronic Post-Traumatic Stress Disorder (PTSD) in our Post-Traumatic Stress Clinical Team (PCT) outpatient clinic, at the Department of Veterans Affairs Medical Center in Miami. Florida.

Mr. Rita was admitted into PCT in November 2005, subsequent to an evaluation and diagnosis of PTSD. He currently participates in hi-monthly group therapy with other Vietnam veterans. He also receives medication management to assist with sleep difficulties and his depressed mood. Re is prescribed Sertraline 100 mg and Amitriptyline 50 mg. Fie has demonstrated good attendance and high motivation with regards to treatment and is compliant with his treatment plan. While he does report having benefitted from the supportive context of his therapy group, he continues to report significant PTSD symptoms, including intrusive memories. nightmares, disrupted sleep patterns. poor concentration, and irritability. It is believed that his chronic PTSD condition has interfered and continues to interfere significantly with his ability to function in both social and occupational settings.

Should you require additional information. please do not hesitate to contact the undersigned at (305) 324-4435 extension 3813.

Sincerly,

/s/ Pam Slone Ph.D
Pam Slone Ph.D.
Licensed Psychologist PCT Clinic

APPENDIX C

DEPARTMENT OF VETERANS AFFAIRS
Medical Center
1201 Northwest 16th Street
Miami FL 33125-1693

Mr. B.T. Gibbard
Veterans Service Center Manager
Regional Office
P.O. Box 1437
Department of Veterans Affairs
St. Petersburg FL. 33731

April 20, 2007

Re: Victor Rita
SS #

Mr. Victor Rita has been under my care for chronic intractable pain of multifactorial etiology. These include cervical spinal stenosis with mild to moderate cord compression., a R rotator cuff tear with impingement, and neurogenic pain related to a diabetic neuropathy. As a result of this he is on analgesics muscle relaxants and sleep aids. In addition to this he is unable to drive due to the multiple medications. He also suffers from PTSD and is under the treatment of Dr. Giron for this. He is service connected for the above conditions.

In light of the multiple conditions, it is my feeling that he is totally and permanently unemployable. If you should need any additional information related to the above do not hesitate to call 305-324-4455 ext. 3080.

Respectfully

/s/ Ronald B. Tolchin D.O.

CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay.

/s/Thomas N. Cochran
THOMAS N. COCHRAN
Counsel for Petitioner